ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
The Development of a National	)	
Framework to Detect and Deter	)	
Backsliding to Ensure Continued	)	RM 9474
Bell Operating Company Compliance	)	
with Section 271 of the	)	
Communications Act Once In-region	)	
InterLATA Relief Is Obtained	)	

AT&T Comments on Allegiance Petition for Expedited Rulemaking

Pursuant to the Commission's Public Notice (Report No. 2315, released February 5, 1999) AT&T Corp. ("AT&T") hereby comments on Allegiance Telecom, Inc.'s petition for expedited rulemaking ("Petition") to establish a framework to detect and deter backsliding by incumbent LECs.

Introduction

Allegiance's petition correctly recognizes a major gap in the Commission's processes for reviewing the behavior of ILECs, especially BOCs, after such companies begin to provide in-region interLATA service.[1] As Allegiance (p. 4) states, it is appropriate for the Commission to work expeditiously to close that gap, because incumbents cannot

[1] Although Allegiance's petition focuses primarily on BOCs, it is also vitally important that processes are in place to assure that other ILECs do not violate their nondiscrimination obligations to CLECs.

be expected to do more than the "rock-bottom minimum to implement the market-opening provisions of the Act." Nevertheless, the Commission already has ongoing proceedings in which these issues could be raised without the need for an additional rulemaking.

Argument

There is no question, especially after the recent Supreme Court decision,[2] that the Commission has the authority -- indeed, the duty -- to adopt minimum national standards in the areas described in the Petition. The Court expressly held that "the [Commission] has rulemaking authority to carry out the 'provisions of this Act,' which include §§ 251 and 252" (1999 WL 24568 at 6). Thus, the Commission has indisputable authority to adopt rules related to BOC post-271 activity and to assure that all ILECs comply with their ongoing obligations under section 251 to act in a nondiscriminatory and just and reasonable manner toward new entrants.[3]

The need for "clear and verifiable performance standards and antibacksliding mechanisms" (Petition, p. 12)

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[2] AT&T Corp. v. Iowa Util. Bd., 1999 WL 24568, __ Sup. Ct.__ (Jan. 25, 1999).

[3] See Petition, pp. 9-11.

is critical to support local competition.[4] This need is heightened by the ILECs' constant efforts to water down (or avoid) their fundamental nondiscrimination and unbundling obligations under the Act. Even BOCs that have proposed specific conditions in return for Commission approval of otherwise anticompetitive mergers have routinely failed to comply with their commitments.[5] As Allegiance (pp. 7-9) states, such failures have contributed to the fact that

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[4] See, e.g., Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance, CC Docket No. 98-56, RM-9101, Notice of Proposed Rulemaking, FCC 98-72, 13 FCC Rcd 12817 (1998) ("Performance Measurements Proceeding"), ¶ 3 (need for verifiable performance standards); Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc, for Provision of In-Region, InterLATA Services in Louisiana, Memorandum Opinion and Order, CC Docket No. 98-121, FCC 98-271, released October 13, 1998, ¶¶ 363-64 (need for performance monitoring and enforcement processes).

[5] Bell Atlantic's failures to comply with its merger commitments extend far beyond the failure to provide region-wide OSS interfaces (see Petition, pp. 7-9). Bell Atlantic's other failures include, inter alia, the failure to propose prices for interconnection and unbundled network elements that are based on the forward-looking economic cost of providing those items, and the failure to comply fully with its obligation to provide performance monitoring reports to the FCC. These matters are fully discussed in AT&T's brief in FCC File No. AAD 94-24, which is being filed on March 8, 1999. Allegiance (pp. 21-22) is also correct that if BOCs do not provide CLECs with adequate wholesale support processes, competition will be choked. Indeed, the independent third party reviewing Bell Atlantic's performance in New York is finding that BANY's support services for CLECs are inadequate and in need of improvement. (KPMG Peat Marwick Exception ID Nos. 3 and 4, opened December 4, 1998).

local competition has not yet seriously developed, and they send a message to other ILECs that they can continue to flout the clear requirements of the Act and the Commission's rules.

Even Allegiance recognizes, however, that many of the issues raised in the Petition are already covered in ongoing proceedings. Thus, it is not necessary to commence a new rulemaking to deal with those matters. Rather, the new issues raised in the Petition would be better resolved in those other proceedings.

Collocation issues, for example, have been fully briefed in the Section 706 Proceeding.[6] The Commission should promptly issue rules in that case to assure that CLECs have access to needed collocation options and specific performance intervals for provisioning collocation requests. AT&T explained the options it believes are necessary for CLECs to compete efficiently in that proceeding. There should be no need to re-argue those issues yet again in a new rulemaking.[7] Indeed, that would only waste the

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[6] Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, FCC 98-188, Memorandum Opinion, Order and Notice of Proposed Rulemaking, released August 7, 1998 ("Section 706 Proceeding").

[7] AT&T would support the intervals and measurement standards for collocation requests adopted in Texas (35 business days to provision and 95% on-time performance) as a national guideline, whether adopted in the Section 706

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Commission's and the parties' resources and could also delay the ultimate resolution of these important matters. Allegiance (n.26) indicates that it would welcome a resolution of collocation issues in the Section 706 Proceeding. That is clearly the most appropriate course of action.

Similarly, ILEC OSS performance and comparative methodologies for assessing such performance are addressed in the Performance Measurements Proceeding and previous Commission proceedings that extend back to mid-1997.[8] As AT&T and other CLECs have argued for almost two years, the Performance Measurements Proceeding addresses critical competitive issues that need prompt resolution. Thus, Allegiance (p. 19) is unequivocally correct that "clear, objective, and verifiable OSS performance standards are a fundamental prerequisite to providing BOCs and CLECs with regulatory certainty regarding the provision of UNEs and

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Proceeding or elsewhere (see Petition, p. 16). However, it is also important to address the manner in which ILECs may handle the "exception" cases, so that their poor performance in such cases will not significantly affect CLECs' ability to compete.

[8] Petition for Expedited Rulemaking of LCI International Telecom Corp. and Competitive Telecommunications Association to Establish Technical Standards for Operations Support Systems, Public Notice, DA No. 97-1211, RM-9101 (released June 10, 1997) ("LCI Proceeding").

related services." However, the best way to handle these matters is for the Commission to rule on the pending issues in the Performance Measurements Proceeding as soon as possible.[9]

Moreover, detection of ILEC performance failures is already an express part of that ongoing docket.[10] The establishment of consequences for ILEC backsliding is an outgrowth of those very same issues.[11] Thus, AT&T suggests that this issue should be made the subject of a follow-on phase of the Performance Measurements Proceeding. However, this should in no way delay a decision on the important matters already pending in that docket.

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[9] In issuing its decision, the Commission should also recognize that an ILEC's performance reports cannot reasonably be deemed valid until its data gathering, reporting and retention systems have been audited by an independent party (see AT&T Comments in the Performance Measurements Proceeding, dated June 1, 1998, pp. 65-66). Thus, ILEC reports that are not supported by such an audit cannot be relied upon to make a determination under either Section 271 or Section 251. Nor can they be considered a firm foundation for determining when and if consequences are applicable to guard against ILEC backsliding.

[10] See Performance Measurements Proceeding NPRM, ¶ 14 ("[p]erformance measurements and reporting requirements should make much more transparent, or observable, the extent to which an incumbent LEC is providing nondiscriminatory [OSS] access").

[11] Indeed, AT&T raised this very issue in its comments on the LCI Petition in July 1997. See AT&T Comments, dated July 10, 1997, pp. 29-33.

Allegiance (p. 24) is correct that meaningful remedies are critical to deter ILEC backsliding. However, AT&T recommends that the Commission adopt a somewhat different approach from that suggested by Allegiance (Petition, pp. 24-28).[12] AT&T believes that remedies for discriminatory ILEC performance should flow directly out of a statistical analysis of the actual ILEC monthly performance reports,[13] not a subset of measurements as referenced by Allegiance (Petition, pp. 25-26). This would not only avoid arguments about which measurements are "critical," and how much weight should be given to each, it will also assure that all CLEC entry strategies are covered and given equal weight.

If the statistical analysis of individual performance results for an individual CLEC shows that it received discriminatory performance based upon a reasonable level of statistical confidence, the CLEC should receive a sum

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[12] A more detailed description of the AT&T proposal is set forth in Attachment A.

[13] Such reports should be prepared on a monthly basis both for each individual CLEC and for the CLEC industry in the aggregate (see AT&T Comments in the Performance Measurements Proceeding, pp. 59-64). Moreover, AT&T's experience with ILEC reporting demonstrates that it is crucial that ILECs be prohibited from excluding data or events that may skew their reported results. At a minimum, ILECs should be required to describe and justify all exclusions before they are made, and to retain all data regarding the excluded performance results. Otherwise, ILECs will have opportunities to game the reporting process and avoid responsibility for their discriminatory conduct.

certain for that violation of the parity obligation. The remedial amounts for specific ILEC performance failures should be increased if the ILEC's discriminatory performance failure for the CLEC extends for three or more months, or if the ILEC's performance level is evident at a very high level of confidence such as 99.9% (for example, the difference between the CLEC and ILEC result is greater than three standard deviations). Critically, these consequences should be self-executing, i.e., there should be no need for a CLEC to file a complaint or other enforcement action to obtain these remedies. This will reduce CLEC costs while providing ILECs with appropriate incentives to perform.

In addition, substantial regulatory fines should be imposed if the statistical analysis of an ILEC's monthly report for all CLECs in the aggregate shows that the number of failures exceeds, with a high degree of confidence, the number of failures that would occur simply through random variation. This is appropriate because the ILEC's performance in such cases is affecting the entire marketplace, not just a single CLEC. Assuming that these regulatory consequences are applied in a near-automatic fashion, i.e., they do not require significant administrative proceedings with the attendant costs and delay, they will provide ILECs with added incentives not to

backslide.[14] In total, all potential backsliding consequences should be in an amount that will have a meaningful impact on ILECs, so that they cannot shrug them off as a cost of doing business.[15]

In sum, AT&T recommends that the Commission establish remedial "antibacksliding" guidelines in the Performance Measurements Proceeding that are as self-effectuating as possible and require the minimum amount of legal or administrative proceedings.[16] In all events, however, the Commission should offer states and the industry its guidance on appropriate anti-backsliding measures as soon as

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[14] In order to implement these remedies, the Commission should assure that individual CLECs have access to all pertinent data concerning the ILEC's performance for itself, for that specific new entrant, and for all CLECs in the aggregate. Such access is required in order to enable CLECs meaningfully to assess the accuracy of the ILEC's performance reporting systems and capabilities.

[15] AT&T also recognizes that the Commission has authority to suspend a BOC's in-region interLATA authority under Section 271(d)(6) (see Petition, pp. 26-27). The Commission should not hesitate to use this authority whenever necessary.

[16] The Commission need not set absolute requirements in this area. Rather, it can define guiding principles and efficiently set a reasonable structure for backsliding principles and then allow the states to tailor those principles to their individual needs, particularly as they relate to the assessment of regulatory fines.

possible, and preferably before it grants any petitions under Section 271.[17]

Conclusion

The Petition identifies critical issues that the Commission should address as soon as possible. However, a new rulemaking is not necessary, because these issues are better resolved in the context of ongoing proceedings.

Respectfully submitted,

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[17] Allegiance (p. 23) is also correct that it would be desirable to have an established process for the rapid resolution of complaints under Section 271. However, the Commission's so-called "rocket docket" process should be adequate for this purpose if it is rigorously followed.

Attachment A

AT&T's Proposed Structure for Self-Enforcing Consequences When ILECs Fail to Provide Non-Discriminatory OSS Support for CLECs

A self-enforcing system of consequences is needed to assure that ILECs have appropriate incentives to comply, on an on-going basis, with their Section 251 obligations to provide CLECs with nondiscriminatory support. Although there may be no single "best" solution, any system adopted by the Commission should adhere to a limited set of essential principles. Those principles are as follows:

1. All ILEC performance must be considered and compared to meaningful performance standards based upon a pre-established and clearly defined quantitative tool for determining if ILEC OSS performance for CLECs is nondiscriminatory.

2. In the aggregate, consequences for ILEC performance failures must have meaningful impact and not be viewed as a minor cost of maintaining the ILEC's monopoly.

3. Consequences must apply without undue delay and few, if any, automatic exclusions of ILEC performance should be permitted.

4. The amount of the consequences must reflect the nature of the ILEC's performance failure:

    a) As the quality of the ILEC's delivered performance degrades, the consequence should increase;

    b) When an ILEC repeatedly fails to provide nondiscriminatory performance on a specific performance measure, the consequence should immediately escalate; and

    c) If discriminatory performance is widespread (industry-wide), additional consequences should apply.

In order to create incentives for ILECs to provide the appropriate level of performance while retaining flexibility to address state-specific situations, the system of consequences should include a combination of interconnection agreement based consequences and regulatory fines.

The general approach AT&T recommends involves two separate evaluations: first, the quality of support delivered to each individual CLEC, and second, the quality of support delivered to the CLEC industry in the aggregate. Monetary consequences in the former situation would be payable to the affected CLEC; in the latter, they would be payable to the governmental agency as regulatory fines..

Consequences Payable to Individual CLECs

Any system of consequences payable to the CLECs should be based on a performance assessment that rests upon sound statistical procedures that judge whether the ILEC's measured performance (at the maximum level of disaggregation required to assure that performance is accurately tracked) reflects nondiscriminatory performance. Quantitative tools should be employed to evaluate if the performance actually delivered by the ILEC is nondiscriminatory, based upon a stated statistical test. If the ILEC's performance falls short of the identified standard, the statistical tool should also be capable of making a determination as to how "flagrant" and how "chronic" the ILEC's violations are.

For example, a reasonable structure for individual performance measurement violations would be to have gradations (e.g., basic, intermediate or severe) of the consequence based upon the severity of the performance failure in the current month. For example, a basic failure should be declared if the ILEC's performance for a CLEC is one standard deviation worse, while a "severe" failure should be recorded if the ILEC's performance for a CLEC is three (or more) standard deviations worse than the ILEC's performance for itself. A separate determination should be based upon the ILEC's performance over time. As an example, three consecutive failures for the same measurement should constitute a "chronic" failure.

In order to provide incentives to maintain on-going performance at the stated level, consequences should be greater for more "severe" failures (i.e., severe>intermediate>basic). Consequences for chronic failures should be equal to those that are applied when a severe failure occurs in an individual month.

Because quantitative decision tools are employed to judge the quality of the performance against a pre-established standard, application of consequences should be immediate, and payment of consequences should be due immediately (i.e., no further regulatory or judicial action should be required). In particular, the determination of whether a consequence applies to an ILEC's performance should not be directly linked to the outcome of a root cause analysis. Root cause analysis is a useful procedure for building action plans to address unacceptable performance, and it should be incorporated within any performance management system. However, the negative impacts upon CLEC customers' experience are complete when the ILEC fails to perform, regardless of any later attempts to cure ILEC failures. Root cause analysis can, at best, leads to improved ILEC performance in the future. Furthermore, assuming that proper diligence is applied in defining of performance measurements, performance failures will be the ILEC's responsibility regardless of the explanation (and no question of CLEC "fault" should arise).

Consequences Applied by Regulators

In addition to consequences that are based on the quality of support delivered to individual CLECs, regulatory bodies need to take action to prevent backsliding that is so pervasive that it affects the operation of the competitive market in general. The same data that are used to evaluate the support an ILEC delivers to individual CLECs can be used to evaluate the quality of support provided to the CLEC industry.

For this second tier of consequences, the data for individual CLECs can be aggregated for each reported measurement. Analysis of aggregated CLEC data focuses upon how many measurements failed, at the aggregate level, to demonstrate nondiscriminatory treatment for the CLEC industry as a whole for various monthly reporting periods, regardless of the severity of such failures. Consequences would apply when a conclusion is reached (at a high level of statistical confidence) that the number of aggregate measurements that fail for the month (and in consecutive months) goes beyond the number expected to occur due to random chance.

There is more than one method that can be used to calculate appropriate ILEC consequences at an industry level. One basis for calculating the applicable fine is the number of access lines in service within the ILEC's operating territory of the that have excessive violations. A specific "dollar per access line" fine could apply, with the size of the fine increasing as the level of confidence used to determine discrimination increases.[1] The attractiveness of this structure is that it automatically scales according to the size of the market impacted by the non-compliant performance (e.g., the larger the number of lines, the larger the applicable fine).

As a final consideration, the fine structure should escalate upon approval of an RBOC's Section 271 application, or a non-RBOC's decision to provide in-region interLATA services. Such an approach reflects the greater potential for damage to the competitive process resulting from backsliding.

[1] Thus, for example, if the amount of the fine were $x per access line if the level of confidence of the finding of discrimination is 95%, the per line amount would be a higher amount if the level of confidence in the conclusion were raised to 97%. Increased confidence is a function of the number of instances in which the ILEC performance reports show discrimination.